

Intractable contact disputes - the extreme unreliability of children's ascertainable wishes and feelings

(Based on lectures given to the Judicial Studies Board 2010-11)

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Introduction

The purpose of this paper is to suggest that the current practice of routinely seeking to establish the wishes and feelings of children caught in high conflicts over contact and residence may be a potential harm to the child and of dubious value. The basis for this opinion is many years of providing expert reports in contested cases in the civil courts of England and Wales, and in particular on the author's experience of insisting that children should be seen with the non resident parent as an essential part of assessments in high conflict cases.

High conflict disputes over contact and residence are not common in the sense that most separated parents reach amicable arrangements for maintaining their children's relationship with each parent. However, a minority of separated parents (possibly about 10%) cannot resolve their problems and initiate contested court proceedings. Within that 10% is a smaller group (possibly 10% of the contested cases) in which there is very high conflict between parents over contact and residence. Although this high conflict group is small in number it looms large in the life of the courts, judges and professionals who become involved in attempting to find a resolution.

Private versus Public Law Cases

It is not only that these cases are time consuming. The most significant impact is the high level of emotion which characterises the contestants and rapidly spreads into the Proceedings. I was quite unprepared for these

difficulties when I first began to report on these cases, despite having had years of experience of providing reports to Local Authorities and later to the courts in Care Proceedings. I soon learnt that the skills and literature which were relevant to assessments in Care cases were rarely applicable to assessment in high conflict contact disputes. This difference between public and private law cases is relevant to readers of this journal. It is my opinion that CAFCASS does not fully appreciate the very different set of skills, experience and background knowledge required in dealing with public and private law cases. Increasingly I find that CAFCASS Reporters and Guardians have had experience in child protection but not in private law. The abolition of the Court Welfare Service greatly accelerated that process.

One similarity between child care cases and high conflict private law disputes is that both tend to involve very serious allegations that parents are abusive or mentally disturbed (serious allegations are made by one parent against the other in about two thirds of high conflict private law cases). But the personal and social backgrounds of the two groups (private and public law cases) are quite different. In care cases one tends to see people whose limited parenting capabilities are overwhelmed by accumulating disadvantages. By contrast one might characterise private law cases as occurring between individuals who have no serious background of disadvantage and who may be employed and socially successful. The children in the two groups tend to be very different. In care cases the children tend to be

beset by disadvantages, behavioural problems and learning difficulties which set them apart from their peers. In private law cases teachers often comment that were it not for knowledge of the extreme conflict between the parents they would not have regarded the children involved as having particular difficulties.

Fear and Loathing

When I began to see private law cases I was not expecting to see nice respectable parents who were profoundly dishonest and devious. I was caught off guard by the intensity of hatred and emotion, the extremes of denigration of an ex-spouse and the total resistance to the idea that the non resident parent had anything positive to contribute to their child's future development. I met nice children who were filled with fear and loathing for a parent they may have loved at one stage in the past. These children were totally resistant to the idea of any form of contact be it direct or indirect. They were rude and dismissive about one of their parents and all relatives on that side of the family. They often refused to accept cards or presents and tore them up or threw them in the bin. When I discussed the possibility of a contact visit the children reacted as though terrified. It was only on reflection that I realised I had assessed many children who had been the victims of serious parental abuse in care cases, who did not react like this at all. In fact in care cases the main problem was that the children retained a strong wish to be with those who had abused them and it was their continuing bond of affection to their abusers which put them at risk. It was some time before I learnt that extreme resistance to contact and rejection of the non resident parent was a well known phenomenon and had been described in similar circumstances throughout the western world.

The assessment process

In my experience most court Reporters, Guardians and clinicians acting as expert witnesses tend to approach the assessment of these cases in a rather similar way. We read

the letter of instruction and the court bundle. We make arrangements to see each of the parties separately and we gather information from relevant agencies such as schools. We speak to the child alone. Finally we try to observe the child with each parent.

It is this last stage of the assessment which is often not completed due to the high level of resistance expressed by the resident parent and/or child to having any form of contact with the non resident parent. Initially I was so concerned by the levels of distress emanating from children and the extreme parental conflict to which they were exposed, that I did not insist that a contact visit should take place. That was a mistake.

Children's right to a voice in court Proceedings

A current factor which influences professionals is the international and UK recognition that children should have a voice in those Proceedings in which their welfare is of central importance. However I am concerned that establishing a child's "wishes and feelings" in high conflict contact and residence disputes is potentially harmful and often misleading.

In England and Wales the courts have a duty to establish the child's "wishes and feelings" (Children Act 1989) and often an Order is made for CAFCASS to do so. The result may be that a family support officer is sent to interview the child and record the wishes and feelings. This is a cheap and easy process but is it useful and harmless? The pressure to conduct such interviews has come from authoritative sources such as the "Children's Rights Alliance for England" whose advice to Parliament was that "We need to change the current situation whereby children's wishes and feelings are sometimes considered but not necessarily followed, to a situation where it is the norm for children's wishes and feelings to be at the forefront of decision making the determining factor even". In a more recent briefing the Family Justice Council

recommended that “Children may wish to participate in one, or more of the following ways: complete a needs, wishes and feelings statement: write a letter to the Judge”. Those sentiments find concrete expression in CAFCASS’ own guidance for practitioners, “My Needs, Wishes and Feelings” in which it is regarded as essential that children should record their wishes and feelings and be encouraged to write a letter to the judge.

The CAFCASS guidance does not acknowledge that the questions necessary to establish children’s wishes and feelings in high conflict cases might put them in the invidious position of having to choose one parent over another, or that in doing so it may provide unscrupulous parents with an opportunity which they can exploit to their advantage.

The research study

The data for the study came from my personal experience of providing reports to courts in high conflict private law cases (Weir 2011). I looked at a ten year period (to 2008) and chose all the private law cases in which the child, who was cared for by one parent, was reported to be opposed to contact with the other parent (contact applications by step parents and grandparents etc were excluded from the study). The vast majority of my cases were a result of being appointed as a single joint expert (Wall 2007). As an independent and self employed expert witness I had no control over the type of cases referred to me and cannot say whether they are typical. In many cases contact was objected to on the basis of very serious allegations made against the non resident parent. In every case that objection had either been resolved by a Finding of Fact Hearing or had been withdrawn on the basis of legal advice. Thus in my cases there were no non resident parents whose contact with their child could be constrained on the basis of allegations. However, even where Findings of Fact had been made, it was common for non resident

parents to take no notice and act as though the allegations were true.

The case selection process produced 78 children who had been reported to be resistant to contact. However 15 of these children revealed at my assessment interview, that they did wish to see the non resident parent. This was usually a surprise as nearly all had been reported by previous interviewers (social workers or court reporters) to be opposed to contact.

Thus even at this first stage of the assessment the previously expressed wishes and feelings of the child turned out to be unreliable. These 15 children’s cases were removed from the research sample. Also removed were four children whose resident parent refused to allow their child to see the non resident parent under any circumstances at the time of my assessment. One other child aged 2½ was removed because s/he was too young. This left a research sample of 58 children who were reported to be resistant to contact and who repeated that resistance during their interview with me. That is to say that their wishes and feelings could reasonably have been said to be established, and often voiced in the most forceful of terms.

Case example

A boy age 7 ½ and a girl age 5 ¾ whose parents had been separated for 3 years. Contact difficulties began immediately and by the time I met them the children had not had contact visits with their father for 2 ½ years. The mother opposed contact on the basis that she was following her children’s wishes as they were angry with the father, were frightened of him and did not wish to see him.

The Guardian had interviewed each child at school. Boy said he was frightened of seeing his father, although he had some positive memories he didn’t want to see him as it would upset his mother. Girl said she was frightened of her father “because we don’t like him”.

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The mother insisted that were it not for the children's feelings she was in favour of contact. The Guardian suspected that the mother's anger with the father affected their views and her two attempts to initiate contact failed because of the children's resistance.

I was appointed as an expert and arrived at the family home to interview the mother and children. The children appeared frightened and were hiding. They had to be persuaded to see me. The mother was angry that my visit was disturbing her children. The mother complained that the court and professionals were bullying her and her children. The children had made their own minds up and didn't want to talk as they were frightened of me.

I eventually persuaded the mother to let me see the children in her presence. Girl refused to answer simple enquiries and hid her face. Boy answered in a quiet, anxious voice. He said his family consisted only of himself, his sister and his mother. As is typical of these cases he initially denied he had a Dad or knowing anyone who might be his Dad. He didn't know why I was visiting. I said that it was about a disagreement between his parents and explained the role of the Courts when parents couldn't decide what was best for their children. I said the disagreement was between his Dad who wanted to see him, as he loved him, and his Mum who was not sure that was a good idea. The mother interrupted me to say that I was wrong, she wanted contact were it not for her children's strong feelings. She complained about the pointlessness of CAFCASS if it did not act upon what her children said.

The mother described difficulties she believed were caused by the prospect of contact, and any mention of the father, including bedwetting, self harm, sleeplessness etc. The children were so traumatised that they became unhappy and aggressive if they saw their father at a distance in the

neighbourhood and shouted, "I hate him why can't he leave us alone". The father had sent a birthday card to Boy who threw it in the bin.

At my interview with Boy I established that he now understood the reason for my visit. He decided there wasn't anything important he wanted me to write down for the Judge. He didn't seem anxious when I explained that I would observe a contact visit with his father as part of my job. Girl refused to talk to me though as I was leaving said, "Mummy said we don't have to go if we don't want to".

Following my standard assessment method, on the following day I collected the children from school with the Guardian and drove them to the contact venue. The children were taken into a room where the father was waiting. Girl immediately withdrew saying she was frightened. They refused to re-enter the room and were settled and encouraged to play games. Once settled the father was brought in. Both looked away. After a while Boy agreed to his father being part of a game and increasingly looked at him and responded. He began to smile. Within ¼ of an hour Girl agreed to join in. The children became lively and happy and talked about their home life and their memories of the past. The whole visit, including collection and travel took 3-4 hours.

On returning the children home Boy told his mother that he had been forced to play with his father. The mother was agitated and repeatedly asked whether he had wet himself. When I explained what had happened she became angry. She could not envisage that the children would ever want to see him. Regular contact was reinstated but difficulties persisted and the case was resolved by a Residence Order to the father.

Not all cases were successful. Some children refused to attend the assessment visit and would not leave their home, school or resident parent's car. Others attended the visit but

remained silent, distressed or hostile throughout.

Overall of the 58 contact resistant children 34 enjoyed a good or reasonable visit. 24 either refused to visit or remained resistant throughout the visit. The results clearly demonstrated that the majority of children (about two thirds) who had been, as far as could reasonably be determined, opposed to contact, were in fact able to enjoy seeing the non resident parent when it was insisted that a visit take place. That is to say that their “ascertainable wishes and feelings” were extremely unreliable. That unreliability becomes even greater if one takes account of the 15 children who unexpectedly told me that they did want to see the non resident parent.

The number of cases was big enough for statistical analysis. That analysis strongly suggested that the success of enforced visits was greater the younger the child and the shorter the interval of no contact. Most of the children in the sample had been the subject of lengthy court proceedings but surprisingly there was no association between length of proceedings and outcome. Most of the children had not had contact with the non resident parent for considerable periods (mean 22 months; range 1 month to 5½ years).

In very young children there were very high rates of successful reunion. Of children under the age of five 100% were able to resume a successful relationship with the non resident parent at a single visit. Between the age of five and seven 80% of children did so.

Over the age of eight 40% of children resumed a successful relationship at the first visit. In this older group the outcome was unpredictable and did not appear related to age or intelligence. For example, one eight year old boy was very resistant when reintroduced to his father after a gap of several years and was counted as a failure (resistant) in my study; but the judge had ordered a series of contact visits and at these his resistance was overcome and at follow up four years later he

enjoyed regular staying contact. In another case an intelligent girl of almost 16 years told me in great detail and with considerable conviction, the reasons why she would never see her father again. She was counted as a failure in the study but two or three weeks later secretly telephoned her father and arranged to meet him. At follow up a year later they were in regular contact.

Why are children’s ascertainable wishes and feelings so unreliable in this situation?

Age influences

Very young children easily resumed a relationship once it was insisted that the visit take place. I suspect they were more influenced by the immediate pleasure of love and attention from the non resident parent, and were quick to forget the influence of their family’s views and less prone to internal psychological conflict.

Resident family influences

In all of these cases antipathy to the non resident parent was strongly expressed to me during the assessment process. Although it was usually denied, I thought it impossible that any child could be oblivious to that. Very commonly the hostility to the non resident parent was shared by members of the extended family and older siblings. Thus the child lived in an environment in which it would have been very difficult to admit or express loyalty to the non resident parent.

Sometimes the partner of the resident parent was rivalrous with the previous parent and usurped their role, for example, by allowing themselves to be called “dad” and encouraging denigration of the previous parent. Sometimes I thought that resident parents were aware of this but unable to confront it as an issue as they did not wish to de-stabilise another relationship or to provide ammunition for the non resident parent.

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A few younger children told me that they had been bullied by older siblings because they were having contact.

Although none of these family influences were systematically studied I can think of no single case in which a resistant child lived in a family where there was not openly expressed hostility to the non resident parent.

Non resident parent influences

Most of my cases involved non resident parents who had been the subject of serious though unfounded allegations. They were regarded as either an immediate risk to the child or as seriously incompetent. Thus contact was viewed as likely to be risky or unpleasant. Over time I learned to arrange much longer observations of contact as many children's resistance only began to reduce after an hour or two. Longer periods of observation of contact seemed more necessary when there had been long periods of no contact or when previous attempts at contact had resulted in failure. Many of my contact observations were between three and eight hours of length and involved the child and parent being in a free environment within the community. Indeed I now conduct all contact observations in the community, including where possible a visit to the non resident parent's home.

Despite the seriousness of the allegations I only observed one (out of the 39 observed non resident parents) example of a parent who was not naturally empathic, skilled and child focused. This was despite the fact that many non resident parents had to cope with resistant children they had barely seen for months or years.

Internal psychological influences

I suspect children's internal psychological conflict is under estimated as a cause of their resistance to contact. All children of warring parents experience conflicts of loyalty, i.e. the child may feel unable to express love for one parent without feeling they are betraying the

other. When parents separate and the warring continues that conflict of loyalty is greatly tested by contact arrangements. The conflict of loyalty creates guilt within the child. That guilt may be diminished by acts of atonement. That atonement might include readily agreeing to criticisms of the other parent, pretending that the contact visit had not been enjoyable, making exaggerated demonstrations of love and dependency, agreeing to or making false allegations against the non resident parent, or taking sides in an extreme form.

In the study sample most of the children had expressed an extraordinary degree of hostility to the non resident parent and were showing signs of "parental alienation". They expressed, "freely and persistently, unreasonable negative beliefs (such as anger, hatred rejection and/or fear) that are disproportionate to the child's actual experience with that parent" (Kelly and Johnson, 2001). Boy and Girl were typical examples of children showing "parental alienation".

The phenomenon of "parental alienation" is now accepted in the UK courts [Re S (Transfer of Residence) [2010] 1 FLR 1785] though a previous formulation, "Parental Alienation Syndrome" (Weir 2010) was highly controversial and has now been abandoned. There have been a number of studies of children showing "parental alienation" (Warshak 2010; Fidler & Bala 2010). These suggest that when such children are forced to move to the previously rejected parent they quickly overcome their apparent resistance and form a normal affectionate relationship, often within hours and certainly within days of the move. This suggests that as a psychological solution it is not particularly stable. Indeed it could be seen as a "false solution" to an intolerable conflict of loyalty. Studies of adults who were subject to "parental alienation" during childhood suggest that many secretly wanted to see the non resident parent, but were unable to express that view to anyone, hoping that someone

would make the decision for them (Baker 2007).

Possible influence of the assessment method

The assessment involves a deliberate attempt to release the child from a sense of guilt and from any sense of responsibility for resuming contact by acknowledging that they were bound to suffer a conflict of loyalty and emphasising that because their parents could not agree it was the judge and not the child who had to decide what would be best. It is possible that this approach allowed some children to be more positive about the non resident parent than I had anticipated and opened a way for them to accept that an assessment contact visit had to take place.

Over time I also learned that the arrangements for the contact visit could be crucial. It was very difficult to persuade resistant children to leave the resident parent's home or car. It was much easier to insist that a visit take place by making arrangements with the school to collect the child from a quiet room during the school day. In this situation children were less likely to be under the influence of their conflict of loyalty (visibly betraying one parent by going off with the other), and more likely to be in a situation in which they had learnt that they had to do as they were told even if they didn't want to.

Conclusions

My study and experience suggests that the wishes and feeling of the majority of children, caught in high conflict between their separated parents, quickly change once it is insisted that a contact visit take place. Their ascertainable wishes and feelings were "extremely" unreliable.

It needs to be emphasised that in none of these cases had the court found that the non resident parent (90% fathers and 10% mothers) had done anything which should cause constraint of their relationship with their children.

Many parents told me that were it not for the wishes and feelings of their child they would support contact, but without exception these parents were extremely angry when contact was successful. Thus, the official weight being given to establishing children's "wishes and feelings" may encourage manipulation behind which a hostile parent can hide their opposition.

The demonstration of a positive relationship between a child and a non resident parent might allow the court an opportunity to consider that resident parents were playing a harmful role in preventing the child's relationship with the non resident parent and to act accordingly.

When "parental alienation" is present the courts may have to take a more active role. Recent research (Fidler & Bala 2010) suggest that the outcome for children with "parental alienation" is not at all good, particularly when the onset of "parental alienation" is before adolescence. In these cases the court may have to take a very active role in finding a remedy which allows the child to maintain a relationship with both parents. That might include, where it is possible, changes of residence for younger children.

Therapy is often considered to be helpful when cases are "stuck" but in my experience it never is and the delays caused are potentially harmful. Again recent research (Fidler & Bala 2010) appears to confirm that there is no successful outcome when therapy is not hand in hand with continuing direct contact.

So should we continue with the process of seeking children's wishes and feelings when they are so obviously unreliable and prone to influence. Children caught between warring parents are faced with a terrible dilemma, to be honest or loyal, when questioned. An Australian study (Cashmore & Parkinson 2008) found that parents whose separation had been least conflicted were most likely to say that the child's voice should not be

determinative and should carry weight at an older age, but in high conflict cases parents were more likely to wish the child's voice to be determinative and for choice to be made by younger children.

Children can be easily influenced by unscrupulous parents and, as many of you believe (Mantle et al 2007), in seeking to determine their wishes and feelings it is best to protect them from the invidious position of having to make a choice of one parent over the other.

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He has taken a particular interest in children as witnesses and has provided hundreds of "veracity" reports in cases involving true and false allegations of sexual abuse. Latterly he has taken a special interest in high conflict parental disputes over children and has completed some empirical research in the area.